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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

GEORGE F. HILLENBRAND, INC., et al., Plaintiffs and Appellants, v. INSURANCE COMPANY OF NORTH AMERICA et al., Defendants and Respondents.	C045011 (Super. Ct. No. CV519223)

APPEAL from a judgment of the Superior Court of Sacramento County, Steven H. Rodda, J. Affirmed.

Law Offices of Robert W. Drane and Robert W. Drane for Plaintiffs and Appellants.

Hinshaw & Culbertson, Robert J. Romero and Paul E. Vallone for Defendants and Respondents.

Civil Code section 3291[1] authorizes prejudgment interest on personal injury damages if the defendant fails to accept an

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part II of the Discussion.

1 All further statutory references are to the Civil Code unless otherwise indicated.

offer to compromise (Code Civ. Proc., § 998) and the judgment exceeds the amount of the compromise offer. In *Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121 (*Gourley*), the California Supreme Court held that section 3291 prejudgment interest is unavailable in insurance bad faith actions because such actions are brought to recover financial loss to the insured and not to recover damages for personal injury.

Plaintiffs George F. Hillenbrand and his corporation, George F. Hillenbrand, Inc., contend they were awarded personal injury damages within the meaning of section 3291 in their malicious prosecution of a declaratory relief coverage action against their insurers and are therefore entitled to prejudgment interest. (See *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784 (*Hillenbrand*).) In the published portion of this opinion, we conclude that because the nature of the Hillenbrand claims in the underlying proceedings is analogous to an insurance bad faith action, *Gourley* precludes an award of prejudgment interest. Hillenbrand's remaining contentions are plainly without merit. We affirm.

FACTS

"A jury found that Aetna Insurance Company maliciously prosecuted two lawsuits against the insureds, George F. Hillenbrand, a framer, and his company, George F. Hillenbrand, Inc. The Insurance Company of North America (INA) handled the investigation and processing of the claim, as well as the prosecution of the lawsuits against Hillenbrand . . . . Based on evidence the insurer prosecuted the lawsuits despite its knowledge of facts triggering potential coverage and a duty to defend, and of the law prohibiting an insurer from suing its insured during the pendency of the underlying claim, the jury awarded Hillenbrand punitive damages." (*Hillenbrand*, *supra*, 104 Cal.App.4th at pp. 791-792.) We affirmed the judgment for compensatory and punitive damages and found the trial court had not abused its discretion by reducing the amount of punitive damages. We reversed, however, the judgment in favor of INA, having concluded that section 2351 does not allow a corporation to exonerate itself from liability as an agent by delegating its obligations to its own employees. (*Hillenbrand*, *supra*, 104 Cal.App.4th at p. 792.)[2]

A year before trial, Hillenbrand made a Code of Civil Procedure section 998 offer to compromise his claim for $499,900, and Hillenbrand, Inc., offered to compromise its claim for $999,900. The insurers rejected the offers.

The jury awarded Hillenbrand $200,000 for "non-economic damages" and Hillenbrand, Inc., $1,245,000 for "total damages." Although the jury also awarded punitive damages to Hillenbrand in the amount of $2,100,000 and to Hillenbrand, Inc., in the amount of $11,900,000, the Hillenbrands accepted the trial court's remittitur of the punitive damages to $1 million and

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[2] Respondents' request for judicial notice, filed March 30, 2004, is granted.

$2 million respectively.[3] The insurers paid the total award of over $6 million.

Hillenbrand and Hillenbrand, Inc., filed posttrial motions for prejudgment interest in the amount of $93,337 on Hillenbrand's compensatory damage award of $200,000 and in the amount of $612,125 on Hillenbrand, Inc.'s, compensatory damage award of $1,245,000. They also requested a new trial order to adjudicate their entitlement to prejudgment interest against INA pursuant to section 3288. The trial court denied the motions.

DISCUSSION

I

Civil Code section 3291 provides, in relevant part: "In any action brought to recover damages for personal injury . . . it is lawful for the plaintiff in the complaint to claim interest on the damages alleged as provided in this section. [¶] If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded

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[3] Punitive damages can be included in the calculation to determine whether the ultimate judgment is more than the offer to compromise even though prejudgment interest is not assessed on the punitive damage award. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 662-663, fn. 13.)

by the judgment, and interest shall accrue until the satisfaction of judgment."

"Courts generally agree that the purpose of section 3291 is to provide a statutory incentive to settle personal injury litigation where plaintiff has been physically as well as economically impaired, and thus it has been considered inapplicable to contractual disputes, business-tort losses and arbitration proceedings." (*Gourley*, *supra*, 53 Cal.3d at p. 126.)

Both Hillenbrands urge us to focus on damages. Hillenbrand the person contends his $200,000 award of noneconomic damages was "damages for personal injury" within the meaning of section 3291. Similarly, Hillenbrand the corporation argues that the compensatory damage award of $1,245,000 for lost earnings also constitutes "damages for personal injury." Courts recognize that mental distress damages flow from both personal injury and interference with property rights. (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 578-580; *Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 433-434.) The dispositive issue is not, therefore, as the Hillenbrands suggest, the nature of the damages, but rather the nature of the right sued upon. (*Gourley*, *supra*, 53 Cal.3d at p. 129; *O'Hara v. Storer Communications, Inc.* (1991) 231 Cal.App.3d 1101, 1118 (*O'Hara*).)

In *Gourley*, an insured and her husband sued State Farm Insurance for breach of the implied covenant of good faith and fair dealing and violation of Insurance Code section 790.03. Because of State Farm's refusal to pay adequate benefits following an automobile collision, the insureds alleged they suffered "'general damages for mental and emotional distress and other incidental damages.'" (*Gourley*, *supra*, 53 Cal.3d at p. 124.) The jury award exceeded the amount of Gourley's offer to compromise. The issue thus posed was whether Gourley was entitled to prejudgment interest on any or part of the bad faith award pursuant to Civil Code section 3291. (*Gourley*, *supra*, 53 Cal.3d at pp. 124-125.)

The Supreme Court, relying on established precedent, held that "the nature of an insurance bad faith action is one seeking recovery of a *property* right, not personal injury." (*Gourley*, *supra*, 53 Cal.3d at p. 127.) The property right, according to the court, involves the right to receive the benefits under the policy. "[A]n 'action against an insurer for bad faith is conceptually similar to an action for interference with contractual relations, for in both actions the primary interest of the plaintiff which is invaded by the defendant's wrongful conduct is the plaintiff's right to receive performance under an existing contract.' (*Richardson* [*v. Allstate Ins. Co.* (1981)] 117 Cal.App.3d [8,] 11-12.)" (*Id.* at p. 129.) The court concluded that breach of the implied covenant in an insurance context is actionable because it causes financial loss, and that loss defines the cause of action even when incidental mental distress accompanies the financial loss. (*Ibid.*)

The parties vehemently disagree on the application of *Gourley* to this case. The insurer insists *Gourley* alone is dispositive. Relying on the court's citation to a malicious prosecution action in Pennsylvania, the insurer contends that prejudgment interest is unavailable for damages arising from a malicious prosecution. (*Wainauskis v. Howard Johnson Co.* (1985) 339 Pa.Super. 266 [488 A.2d 1117].) The Hillenbrands, on the other hand, point out that *Gourley* involves a bad faith claim, not a malicious prosecution action. According to the Hillenbrands, we are not bound by dictum in the *Gourley* opinion.

Although we agree with the Hillenbrands that we are not bound under principles of stare decisis to apply *Gourley's* rationale involving bad faith claims to the entire genre of malicious prosecution actions, we conclude that the Supreme Court's analysis does apply given the nature of the underlying lawsuit now before us. As in *Gourley*, the insurer refused to provide the benefits promised in the policy. In *Gourley*, the insurer blamed the insured for the damages she suffered because she was not wearing a seatbelt. Here the insurer sued the Hillenbrands for declaratory relief in hopes of avoiding the duty it realized it had to defend its insureds. Both insureds were frustrated in their attempts to reap the benefits of their policies. But whereas Gourley thereafter filed a bad faith claim, the Hillenbrands filed an action for malicious prosecution following their success in the underlying declaratory relief action. In both instances, juries vindicated the insureds' claims and included in the awards damages for the emotional distress the insureds suffered as a result of the insurers' abdication of their responsibilities under their policies.

Conceptually, of course, the two torts differ. A cause of action predicated on a breach of the implied covenant of good faith is intimately connected to the insurance policy because there can be no bad faith action in the absence of a contract. Malicious prosecution, by contrast, does not necessarily depend on a contract or any contractual or business relationship between the parties. Rather, the essence of a malicious prosecution action is the malicious abuse of the judicial process.

Nevertheless, we must not consider the torts in the abstract but rather the actual nature of the interests before us. The question is whether Hillenbrand, the man, or Hillenbrand, the business, brought actions for *personal injury* as that term has been used by the Legislature in section 3291 and construed by the courts. We conclude they have not. The essence of their action related to their protracted insurance dispute. As a consequence, the damages they suffered were tethered to their insurance policy or, in other words, to a property interest, and damages, including those Mr. Hillenbrand suffered for his emotional distress, were incidental to his insurer's refusal to defend him and its aggressive strategy to sue him in the meantime.

Attempting to skirt *Gourley*, the Hillenbrands insist their malicious prosecution action against their insurer is more akin to defamation than to a bad faith claim. They argue that defamation and malicious prosecution are both actions to vindicate personal interests and to obtain compensation for damage to a victim's reputation. The most obvious flaw in their argument is that the express language of section 3291 does not speak in terms of "personal interests" but is limited to actions for "personal injury." Analogizing malicious prosecution to defamation, the Hillenbrands conclude their lawsuit against their insurer sought compensation for a personal injury within the meaning of the statute. We disagree.

It is true that defamation involves a personal injury within the meaning of section 3291 because the nature of the tort involves an "'invasion of the interest in reputation and good name. . . .' [Citation.]" (*O'Hara*, *supra*, 231 Cal.App.3d at pp. 1117-1118.) But we reject the broader generalization that a malicious prosecution action necessarily, or by definition, "'diminish[es] the esteem, respect, goodwill or confidence in which the plaintiff is held, or . . . excite[s] adverse, derogatory or unpleasant feelings or opinions against him.'" (*Id.* at p. 1118.) Although withstanding civil litigation may be emotionally and financially depleting, we cannot accept the Hillenbrands' notion that the essence of the tort involves an inherent diminution in a litigant's reputation.

Here, the Hillenbrands' malicious prosecution case was brought essentially to recover financial damages. The essence of the dispute involved the insurer's efforts to avoid its duty to defend its insureds. Although ultimately the Hillenbrands prevailed in their malicious prosecution claim, their economic damages derived from the protracted battle over coverage and the duty to defend. Financial tort losses since *Gourley*, even when accompanied by alleged emotional distress damage, are not subject to section 3291's prejudgment interest provisions. (*Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418, 1436.) The Hillenbrands' reliance on defamation, wrongful death, and negligence cases are inapposite.

Because a corporation can sue for defamation, Hillenbrand, Inc., claims it can sustain a personal injury for purposes of a prejudgment interest award. It fails to cite any case in which a corporation was awarded prejudgment interest on a personal injury judgment. Having rejected the defamation analogy to malicious prosecution, and in the absence of any authority, we cannot accept the counterintuitive proposition that a corporation can sustain a personal injury within the meaning of section 3291.

II

In our earlier published opinion in this case (*Hillenbrand*, *supra*, 104 Cal.App.4th 784), we rejected Hillenbrand's request for a new trial on punitive damages against INA. He now requests a new trial on prejudgment interest against INA pursuant to section 3288. Section 3288 provides that "[i]n an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." He contends the trial court misconstrued our opinion when it denied prejudgment interest. He is wrong. The trial court properly construed what we continue to believe is the plain meaning of our decision.

The trial court explained: "The appellate decision indicates a clear intention that nothing remains for retrial as against defendant INA. This conclusion is amply supported by the appellate court's application of collateral estoppel to preclude INA from the opportunity to relitigate the issues of liability and damages, and its decision to preclude plaintiffs a second trial upon punitive damages."

The opinion supports the trial court's interpretation. We wrote: "We conclude, therefore, that INA is collaterally estopped from challenging liability because it was in privity with Aetna/CIGNA/ACE throughout the litigation. The only evidence to support the malicious prosecution verdict against Aetna/CIGNA/ACE was the evidence that INA's employees filed the declaratory relief actions against Hillenbrand maliciously and without probable cause. INA does not have the right to a new trial to contest the liability that has been conclusively determined in the malicious prosecution trial." (*Hillenbrand*, *supra*, 104 Cal.App.4th at p. 827.) We stressed that the interests of INA and Aetna/CIGNA/ACE were identical. "It was INA's employees whose conduct the jury determined constituted the tort of malicious prosecution. There was absolutely no evidence that Aetna/CIGNA/ACE had anything to do with the processing or litigation of Hillenbrand's claim. The parties conceded at trial that INA was acting as the insurer's agent. It was INA, not Aetna/CIGNA/ACE, that controlled when the actions would be filed and how they would be prosecuted." (*Ibid*.)

Exercising its discretion pursuant to section 3288, the jury denied Hillenbrand’s request for prejudgment interest against the insurer at trial. He would now like another trial against INA despite the facts that we found the interests of the two entities identical in this lawsuit, we denied the request for new trials on liability or punitive damages, and Hillenbrand never raised the issue of prejudgment interest in his first appeal. Since, as we emphasized throughout our published opinion, the insurer acted only through INA, the jury verdict in the first case resolved all issues involving INA. The trial court properly construed our opinion in denying but another Hillenbrand attempt to keep alive litigation that began over 30 years ago. The judgment has been paid. It is time to put this matter to rest.

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

SIMS, Acting P.J.

MORRISON, J.